No. 15-338

In The
Supreme Court of the United States

MARK J. SHERIFF, ET AL.,

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners fail to identify sufficiently compelling reasons to grant this Petition to review the underlying decision of the Sixth Circuit Court of Appeals ("Sixth Circuit").

1. There is no reason for the Court to review the Sixth Circuit's determination that independent contractors like "special counsel" are not "officers" within the meaning of 15 U.S.C. §1692a(6)(C) under the Fair Debt Collections Practices Act ("FDCPA").

2. There is no reason for the Court to reconsider the Sixth Circuit's determination that "special counsel's" use of the Ohio Attorney General ("OAG") letterhead stationery to collect consumer debts could materially mislead the least sophisticated consumer in violation of 15 U.S.C. §1692e(9) and (14).

PARTIES TO THE PROCEEDINGS

Plaintiffs-Appellants below and Respondents here are Pamela Gillie and Hazel Meadows.

Defendants-Appellees below and Co-Petitioners here are Mark J. Sheriff (also referred to herein as "special counsel"), Sarah Sheriff, and Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.

Intervenor-Defendant below and Co-Petitioner here is the Ohio Attorney General, Michael DeWine.

Eric A. Jones (also referred to herein as "special counsel") and the Law Office of Eric A. Jones, LLC was also a Defendant-Appellee below who has filed a separate Petition for Writ of Certiorari.

RULE 29.6 STATEMENT

Respondents, Pamela Gillie and Hazel Meadows are individuals, making this statement inapplicable.

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INTRODUCTION

Petitioners' first argument is based upon concerns over federalism. Pet. at 15-18. Petitioners theorize that collection of State university hospital and tuition bills is tantamount to the exercise of "core state functions" or "sovereign powers" – irrespective of whether the State outsourced the exercise to third-party, independent contractors selected by the OAG from the marketplace. Pet. at 1-6; 17 Here, the independent contractors are known as "special counsel." Petitioners argue on the one hand that because the OAG's independent contractors collect debts of the State, and because collection is in their view a core governmental function, "special counsel" can qualify as an "officer" within the meaning of 15 U.S.C. §1692a(6)(C). On the other hand, Petitioners assert that ambiguity exists in the FDCPA as to the definition of "officer" and as such, application of the FDCPA to the OAG's independent contractors would violate the "clear statement rule." Pet. at 13-17

The Sixth Circuit rejected Petitioners' position by recognizing that Respondents' case does not involve the OAG or the State of Ohio outside of a factual reference to the State entities to whom Respondents owed money. Pet. App. 39a. Collections of consumer debts of the types at issue are not the exercise of "core state functions." Rather, they are proprietary rights enjoyed by the State, private individuals and business entities alike. Respondents' FDCPA suit only seeks relief against private, for-profit, independent contractors who violated several FDCPA sections

including 15 U.S.C. §§1692e(9) and (14). Pet. App. 39a.

Petitioners' federalism argument fails largely due to its dependency upon circular reasoning. Petitioners ask the Court to expand the definition of the term "officer" within the meaning of the FDCPA to protect the OAG's independent contractors. However, Petitioners argue that the FDCPA cannot apply because it is ambiguous. As a predicate to even broaching the federalism topic, Petitioners must demonstrate that the "debt collectors" subject to FDCPA regulation are indeed "*the* State." The FDCPA does in fact clearly answer this question. It measures the extent to which its provisions reach the activities of both the United States and the States, by asking whether the actor at issue is an "officer or employee to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. §1692a(6)(C).

Had he been sued, the OAG would be exempt from liability because he is a State "officer." Neither the OAG nor the State of Ohio was sued. Moreover, Petitioners concede, as they must, that "special counsel" are not "employees." Indeed, everyone agrees that "special counsel" are independent contractors expressly defined as such in the parties' lengthy written contracts. Petitioners seek to review the Sixth Circuit Court of Appeals' rejection of their notion accepted by the U.S. District Court that the term "officer" must be extended to widely cover the State of Ohio's independent contractors.

The simple reality is that "special counsel" are not unique or special. They are private attorneys who engage in collection of consumer debts as part of their separately controlled businesses. The OAG selects these individuals from the marketplace. While the OAG is statutorily enabled to make the selection by virtue of Ohio statute, R.C. §109.08, "special counsel" remain what they are – independent contractors. When communicating with consumers regarding collection of consumer debts "special counsel" should receive no special dispensation from the FDCPA's wide-ranging remedial coverage.

The Sixth Circuit's recognition of the above reality does not conflict with the precedents of this Court or of any other Circuit Courts of Appeals. To the contrary and to the extent concepts of federalism, and Eleventh Amendment immunity could even be at stake, the decision is consistent with two decisions from the Ninth and Eleventh Circuits that thoughtfully addressed the issue.

Further, Petitioners oversell the jurisdictional "importance" of the federal question answered by the Sixth Circuit. The ruling involves activity that is generally localized to independent contractors engaged by the OAG in the State of Ohio. While it is doubtless that several million individuals received the types of offending communications at issue in this case, the actions of this isolated group of Ohio private attorneys does not warrant the sort of additional, exceptional, review generally reserved by this Court. More importantly, the federal question answered

below does not conflict with relevant decisions of this Court.

Finally, Petitioners seek to manufacture an issue for review based upon arguments that were never raised until Petitioners filed their losing request for re-hearing *en banc*. Therein and now, Petitioners seek to resolve a non-issue: whether practices that violate 15 U.S.C. §1692e are misleading to the "least sophisticated consumer" or to the "unsophisticated consumer." Based upon the precedential evolution of both standards, there is no appreciable difference between the two that requires resolution.

Accordingly, Petitioners' request for writ of certiorari should be DENIED.

STATEMENT OF THE CASE

A. Factual And Procedural Background

For the 2012 to 2013 contract year, the OAG engaged Mark Sheriff, an attorney with Wiles, Boyle, Burkholder & Bringardner Co., LPA ("Wiles"), as "special counsel" under R.C. §109.08. Pet. App. 25a.

In 2007, Mr. Sheriff's firm sued Respondent, Hazel Meadows, to recover a tuition debt owed to the University of Akron. Id. Ms. Meadows agreed in a judgment entry signed by her counsel to make monthly payments. Id. Ex. B, PageID#1083. She made timely payments thereafter. Doc. 60-1, S. Sheriff Aff., PageID#1077

In July 2012, Sarah Sheriff, a Wiles employee, claims that she fielded a call from Ms. Meadows "asking Sheriff for her balance." Id., PageID#1078. Ms. Sheriff sent a dunning letter dated July 20, 2012 seeking to collect the balance as stated. Pet. App. 17a. The letter was sent using the OAG's official letterhead stationery for his "Collections Enforcement Section." Id. Ms. Sheriff, a non-lawyer, signed the letter. The letter contained the additional notation under her signature: "Special Counsel to the Attorney General." Id.

Ms. Meadows asserted that she did not "recall ever asking anyone for any information about this matter." Doc. 48-3, Meadows Aff., PageID#612. The letter "scared her because she thought that the OAG might charge her with a crime for not paying what he said she owed." Id., PageID#613.

As with Sheriff, the OAG engaged Eric A. Jones as "special counsel" for the July 2011 to June 2012 contract year. Pet. App. 25a. On May 24, 2012, Jones sent Respondent, Pamela Gillie, a dunning letter on OAG letterhead stationery seeking to recover a university medical bill. Pet. App. 14a.

Ms. Gillie stated that when she first looked at the letter she believed that it came directly from the OAG and assumed that Mr. Jones must have been an attorney with the OAG's office. Doc. 48-1; P. Gillie Aff., Ex. A, PageID#608-610 at ¶¶ 5, 6. Only after thoroughly considering the letter did Ms. Gillie's suspicions take hold – that something didn't seem right. Ms. Gillie explained that she became greatly

confused as to who really sent the letter. Doc. 48-1; P. Gillie Aff., Ex. A, PageID#608-610 at ¶¶ 10-14. She even believed that because of the appearance of certain aspects of the letter including the payment return address and payment coupon, the letter could have been some sort of scam to scare her into paying money by someone pretending to be the OAG. Doc. 48-1; P. Gillie Aff., Ex. A, PageID#608-610 at ¶ 12.

On March 5, 2013, Respondents brought a class action against Mark Sheriff, Sarah Sheriff, and Wiles, and Jones and his firm. Respondents alleged, *inter alia*, that the use of the OAG's letterhead stationery by "special counsel" violated Respondents' consumer rights under various provisions of 15 U.S.C. §1692e including subsections (9) and (14). Doc. 1, Compl., PageID#16-19.

On August 12, 2014, the U.S. District Court granted the motions for summary judgment filed by Mark Sheriff, Sarah Sheriff, Wiles, Eric Jones and Mr. Jones' firm. Pet. App. 77a; App. C. Respondents appealed.

On May 8, 2015, the Sixth Circuit reversed. Pet. App. 18a; App. B.

On July 14, 2015, the Sixth Circuit denied Petitioners' request for rehearing *en banc*. Pet. App. 1a; App. A.

The instant Petition for a Writ of Certiorari ensued.

REASONS FOR DENYING THE WRIT

I. There Is No Reason For The Court To Review The Sixth Circuit's Determination That Independent Contractors Like "Special Counsel" Are Not "Officers" Within The Meaning Of 15 U.S.C. §1692a(6)(C) Under The Fair Debt Collections Practices Act ("FDCPA")

A. There Is No Conflict With This Court's Decisions.

1. Federalism Is Not At Issue

The Sixth Circuit's decision does not conflict with this Court's precedents, and does not involve issues of either federalism, or rejection of the "clear statement rule."

The Sixth Circuit correctly determined that "special counsel" are independent contractors who, "in truth, are indistinguishable from the myriad of independent contractors who enter into for-profit agreements with government agencies or actors to help fulfill the duties of some government office." Pet. App. 29a. Reviewing the Dictionary Act, Black's Law Dictionary, Ohio's own Revised Code definitions, available case law, as well as a supportive Ohio Ethics Commission's Advisory Opinion, the Sixth Circuit ultimately held that independent contractors like "special counsel" do not qualify as "officers" as that term is used in the FDCPA. Pet. App. 29a-40a and *Advisory Op.* No. 75-015.

Petitioners highlight their belief that Ohio's "sovereignty" is at the heart of this case by devoting the first 6 pages of their statement to explain the obvious, undisputed, and "goes without saying" fact that the States have historically placed high importance on the manner and priority associated with payment and collection of their debts. Pet. at 2-4.

One need not cite to the Magna Carta or to decisions from the Chancellor of the Exchequer to reinforce the seriousness of recovery of funds owed to the States. Respondents get it. How the State of Ohio collects its own debts is serious business.

While the State's collection of these consumer debts is serious to the State, the acts and practices associated with such collections are not so unique that they become constituent elements of the ether that makes up a State's sovereignty.

Petitioners believe that because history supports the "serious" nature of a sovereign's prerogative to collect the public's debts, the power to do so is transformed into a "sovereign power" – so much so that anyone with whom the sovereign contracts should realize the same sovereign immunity. This is an exaggeration.

Moreover, in the case of independent contractors who share undeniably strong similarities to "special counsel," this position has already been rejected by at least two other Circuit Courts of Appeals. *Rosario v. Am. Corrective Counseling Servs.*, 506 F.3d 1039 (11th Cir. 2007); *Del Campo v. Kennedy*, 517 F.3d 1070 (9th

Cir. 2008). The Sixth Circuit's decision is wholly consistent with these rulings.

Collection of debts is simply a proprietary right that can be exercised by most anyone or any entity. Pet. App. at 36a. Businesses, individuals and governments alike collect debts every single day. By contrast, not just anyone or any entity is authorized to tax, or to make or enforce laws to govern the public. Taxation and public law creation are the types of functions that truly represent core sovereign power. Id.

That the OAG does not completely reserve the State's proprietary right to collect the State's debts for his own office and employees but instead outsources the responsibility to "special counsel" is telling. A State government could not legitimately outsource the responsibilities to tax or to create public law to third parties and expect to retain sovereign power. Thus, the State's actions to direct collection of its consumer debts to independent contractors clearly underscores the mundane rather than sovereign nature of the rights exercised.

Bringing the analysis back to the FDCPA, Petitioners' argument stems from its desire to over-expand the definition of the term "officer" as it used in 15 U.S.C. §1692a(6)(C). Traditional canons of statutory interpretation hold that exemptions to broad remedial statutes are to be read narrowly. *C.I.R. v. Clark*, 489 U.S. 726 (1989), citing *Phillips v. Walling*, 324 U.S. 490 (1945). Thus, Petitioners'

argument for adoption of a broad definition of the term "officer" and/or for the inclusion of additional immunities (see infra) not expressed in the exemption provisions would be improper.

Respondents note that they have never argued that the FDCPA should be deemed to regulate the consumer debt collection activities of the OAG or of the State of Ohio. Respondents' case is calculated to address the behavior of private attorneys and private attorneys only. That the OAG directed these private attorneys to use his letterhead, and further, that these private attorneys actually followed the OAG's directive in contravention of the FDCPA is a matter between the OAG, the State of Ohio and the private attorneys.

Petitioners shout federalism because it is allegedly unclear to *them* that Congress chose not to exempt independent contractors. Yet the term "officer" was left undefined in the FDCPA. That the term was undefined does not automatically render the Congressional statement unclear or ambiguous. The "susceptibility of the word to alternative meanings 'does not render the word whenever it is used, ambiguous,' particularly where 'all but one of the meanings is ordinarily eliminated by context.'" *Carcieri v. Salazar*, 555 U.S. 379, 391 (2009), citing *Deal v. United States*, 508 U.S. 129, 131-32 (1993). If that were true, untold numbers of federal statutes containing common undefined terms that also coincidentally have some impact on the activities of States would be subject to invalidation. Such an overbroad

interpretation of the "clear statement rule" should be rejected.

2. The Sixth Circuit Did Not Reject The Clear Statement Rule

Based upon the tone of his appeal, the OAG obviously did not appreciate being told that his private debt collectors, selected from the marketplace, failed to meet the criteria to be defined as an "officer." This of course follows the irony that the OAG touts consumer protectionism as one of his main goals. Pet. at 35. In fact, the OAG contractually requires his "special counsel" independent contractors to abide by the FDCPA. Pet. at 34, citing Doc. 48-8, Contract, PageID#646. But, when confronted with Respondents' case, Petitioners complain that their actions are not covered by the FDCPA. Petitioners resort to calling the FDCPA an unclear intrusion into State sovereignty because they disliked the interpretation the Sixth Circuit provided for the undefined term "officer." They claim that Congress did not clearly articulate that activities of the State would be altered.

However, nothing contained in the appellate court's ruling is tantamount to a "rejection" of the "clear statement rule." To the contrary, the Sixth Circuit wholly acknowledged that "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear

in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Pet. App. 38a.

The Sixth Circuit simply observed that Respondents' case did not involve questions concerning the regulation of Ohio or the structure of Ohio's government. Pet. App. 39a. Thus, it was unnecessary for the Sixth Circuit to directly respond to Petitioners' challenge that federalism and/or clarity of definition was at issue. It does not follow that the Sixth Circuit's holding implied that it chose not to follow or reject the clear statement rule. If pressed, Respondents believe that the Sixth Circuit would have easily concluded that the FDCPA was enacted to touch limited aspects of State governmental debt collection. Pet. App. 38a-44a.

Indeed, the FDCPA expressly mentions both Federal and State government activities in numerous places. One prominent example not previously discussed but which exposes the weakness of Petitioners' argument is found in section 1692n (which states):

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, **except to the extent that those laws are inconsistent with any provision of this subchapter**, and then only to the extent of the inconsistency. For the purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any

> consumer is greater than the protection provided by this subchapter.

15 U.S.C. §1692n (emphasis added).

This is the FDCPA section devoted to federal preemption. Like the FDCPA's exemption provisions, this provision is also clear and unambiguous. It speaks to preserving the balance of power between the State and Federal governments. In enacting the FDCPA, Congress preempted State law only to the extent such law would provide *less protection* than that offered by the FDCPA. In this regard, the FDCPA provided the floor for minimum consumer protection standards. *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 951 (9th Cir. 2011) ("Congress enacted the FDCPA expressly because prior laws for redressing 'abusive, deceptive, and unfair debt collection practices' were 'inadequate to protect consumers.' 15 U.S.C. §1692(a), (b). The statute preempts state laws 'to the extent that those laws are inconsistent with any provision of [the FDCPA].' 15 U.S.C. §1692n.").

Petitioners assert that private, "special counsel" independent contractors must be "officers" under Ohio law. Indeed, the OAG seeks to envelop "special counsel" under the "officer" mantle by executive fiat, a law no less impactful than a statute coming from Ohio's legislature. After all, there is no Ohio law that directly governs the actions of "special counsel," much less defines them as anything more than independent contractors. Allowing Petitioners' interpretation of

the OAG's authority in this regard to prevail would be inconsistent with the FDCPA's protections and must therefore be rejected. Even if the OAG could unilaterally manifest some definition of the term "officer" that would include "special counsel," such a pronouncement would be inconsistent with the FDCPA and thus ineffectual as a matter of federal preemption under §1692n.

Further, it is worth reiterating here that the FDCPA provides extremely broad coverage against debt collectors to protect consumers. *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir. 1992). Notwithstanding Petitioners' arguments to the contrary, Congress did indeed provide a clear and unambiguous statement that limited immunities exist in favor of officers and employees of the United States or the States. 15 U.S.C. §1692a(6)(C). Nevertheless, to give full effect to the FDCPA's remedial nature these statutory exemptions must be construed narrowly. *C.I.R. v. Clark*, 489 U.S. 726 (1989), citing *Phillips v. Walling*, 324 U.S. 490 (1945). The Sixth Circuit Court of Appeals' invocation of that rule of statutory interpretation should not be viewed as abandonment of the clear statement rule.

3. Section 1983 Cases Are Inapposite

Petitioners further confuse matters by their efforts to analogize principles of "qualified immunity" sometimes available to defendants in 42 U.S.C. §1983 cases with the FDCPA's exemption for State "officers

or employees." Here however, Respondents sued for violations of the FDCPA in accordance with their private rights of action. They did not sue for relief under §1983 for deprivation of their constitutional rights. Thus, the §1983 case law cited by Petitioners is inapposite.

Nevertheless, Petitioners' notion that the Sixth Circuit's decision is somehow in conflict with this Court's decisions in *Filarsky v. Delia*, 132 S. Ct. 1657 (2012) and *Malley v. Briggs*, 475 U.S. 335 (1986) deserves appropriate retort. In short, to allow Petitioners' comparison to stand would render the express exemptions of 15 U.S.C. §1692a(6) superfluous.

Briggs and *Filarksy* both involved alleged deprivations of Fourth and Fourteenth Amendment rights. *Briggs* involved a false arrest by a police officer based upon the officer's acquisition of an implausible arrest warrant. *Briggs*, 475 U.S. at 338. *Filarsky* involved a firefighter's suit against city officials and a private attorney for allegedly conducting an arguably wrongful internal affairs investigation leading to a warrantless search. *Filarsky*, 132 S. Ct. at 1661.

Relevant here, the actor at issue in *Briggs* was an actual employee of the city while the actor in *Filarsky* was a private attorney hired by the city to conduct the internal affairs investigation. Because §1983 did not expressly deal with the immunity for certain government actors, the law evolved to consider immunity in such cases based upon common law. *Filarsky*, 132 S. Ct. at 1660. Ultimately, qualified

immunity under §1983 was extended in both cases to both individuals.

Citing these two inapposite decisions as support, Petitioners posit that the common law surrounding governmental immunities in §1983 must be available to all government actors under the FDCPA – this in spite of the fact that the FDCPA, unlike §1983, already contains specific self-contained exemptions. 15 U.S.C. §1692a(6). Subsection (C) speaks directly to the issue of government actor immunity. 15 U.S.C. §1692a(6)(C). As held by the Sixth Circuit, rules of statutory construction require such a finding. Pet. App. at 52a ("Qualified immunity is inapplicable to an action brought under the FDCPA where Congress has included an explicit exemption from debt collector liability for government officials. Cf. *Andrus v. Glove Construction Co.*, 446 U.S. 608 (1980)."). Id.

On this point, Respondents must wag the finger at Petitioners' inability to succumb to the temptation to beg an answer to the question: why is it that under §1983, an independent contractor who is said to act under "color of law" sometimes gets qualified immunity when a similar independent contractor cannot receive similar immunity for misconduct under other federal statutes like the FDCPA?

The answer is Congress interceded in the FDCPA where it did not in §1983. There are no express exceptions set forth in §1983, a law that has been on the books for over 100 years. Thus, the courts have historically relied upon application of the common

law of immunities as they existed at the time of the statute's inception. *Filarsky*, 132 S. Ct. at 1662.

By contrast, the FDCPA's immunity provisions are fully expressed in a specific exemption provision. Petitioners now ask the Court to incorporate §1983's common law immunity analysis into the FDCPA but to do so would render the express FDCPA immunity provisions superfluous in further violation of settled rules of statutory construction. *Corley v. United States*, 556 U.S. 303, 314 (2009) ("a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. "), citing *Hibbs v. Winn*, 542 U.S. 88 (2004). If common law immunities rule, governmental officers and employees are already absorbed, making the FDCPA exclusion unnecessary. This simply cannot be under the rule against antisuperfluousness.

Rejecting Petitioners' conclusion is also consistent with the language contained in *Filarsky*. Justice Roberts stated:

> We read § 1983 "in harmony with general principles of tort immunities and defenses." *Imbler*, 424 U.S., at 418, 96 S. Ct. 984, 47 L. Ed. 2d 128. And we "proceed on the assumption that common-law principles of immunity were incorporated into our judicial system and that **they should not be abrogated absent clear legislative intent to do so.**" *Pulliam v. Allen*, 466 U.S. 522, 529, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984).

Filarsky, 132 S. Ct. at 671-72 (emphasis added). Thus, even if Petitioners' argument were remotely plausible, the self-contained FDCPA exemptions signify Congress' clear intent to provide only very narrow immunity for properly defined officers or employees of the State.

It is worth mentioning here that the holding in *Filarsky* also comes with a proviso. In her concurring opinion in *Filarsky*, Justice Ginsburg reminds us that qualified immunity may be overcome "if the defendant knew or should have known that his conduct violated a right 'clearly established' at the time of the episode in suit." *Filarsky*, 132 S. Ct. at 1668. Assuming again that some additional immunities exist *vis a vis* §1983 as Petitioners urge, it is impossible to imagine how qualified immunity could ever exist in this case.

Even though they are independent contractors, "special counsel" may very well act under "color of state law" for §1983 purposes. Yet, they are also experienced collection lawyers who are contractually obliged to know and abide by the FDCPA. Using a name other than one's true name on consumer debt collection communications plainly violates a consumer's clearly established rights under 15 U.S.C. §1692e(14). While the OAG may have directed "special counsel" to prominently use the OAG's name and seal on all debt collection communications, "special counsel" should have known that such conduct would violate the FDCPA. Even under *Filarksy*, "special counsel" would have no immunity.

Based upon the foregoing, the lower court's decision is not in conflict with this Court's precedents involving interpretation of §1983 cases including *Briggs* and *Filarsky*.

B. The Sixth Circuit's Decision Does Not Conflict With Decisions From Other Circuit Courts Of Appeals – *Heredia v. Green* Is Inapposite

In their quest to find some conflict in other circuit court decisions, Petitioners trot out the aged case of *Heredia v. Green*, 667 F.2d 392 (3rd Cir. 1982). Pet. at 21-23. Petitioners label *Heredia* as "analogous" while they simultaneously criticize the truly analogous decisions of *Pollice v. National Tax Funding L.P. et al.*, 225 F.3d 379 (3rd Cir. 2000) and *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260 (9th Cir. 1996). Petitioners describe *Pollice* and *Brannan* as "far-afield" because ownership of the government debts were transferred and "involved debt collection for *private parties.*" Pet. at 23.

At best, Petitioners' arguments are baffling. At worst, they are specious.

1. In 1982, the Third Circuit Court of Appeals in *Heredia* considered the activities of a court appointed, Landlord and Tenant Officer of the Philadelphia Municipal Court. The court position was created to cut down on the deluge of eviction proceedings that resulted from a case that overturned existing *ex parte*

eviction processes. The L&T officer position was thus created and charged with issuing required eviction notices which also include defaulted rent balances due from private landlords and private tenants. *Heredia*, 667 F.2d at 395. Unlike the debts here, the debts at issue in *Heredia* were *never* owed to a governmental entity. They were always owed to *private* landlords.

Thus, under Petitioners' own test for determining whether a case is "far-afield" (collection for private parties), *Heredia* fits that bill more so than either *Brannan* or *Pollice*. More importantly, *Heredia* is purely distinguishable because the L&T officer was not an independent contractor like "special counsel." Pet. App. 38a at fn. 10. Indeed, the L&T officer occupied an office at the courthouse and his conduct to issue the notices and to charge the fees questioned in the case were strongly regulated by the President Judge who appointed him. *Id. Heredia* is clearly inapposite for those reasons.

2. *Pollice* also came from the Third Circuit Court of Appeals and also considered the 15 U.S.C. §1692a(6)(C) exemption. Even though its prior opinion could have offered some academic comparison as to the issue, the panel in *Pollice* did not even mention *Heredia*. We are left to speculate why, but the strong language contained in Judge Gibbons' dissenting

opinion in *Heredia* offers the best starting point. *Heredia*, 667 F.2d at 397

In *Pollice*, aging City of Pittsburgh debts for water and sewer charges were sold after default to a private company. But, the City retained certain rights over servicing of the claims. The City entered into a servicing contract with Capital Asset Research Corp., Ltd. ("CARC") to collect these government bills. *Pollice*, 225 F.3d at 386. CARC attempted to collect certain questionable rates of interest and penalties added to the debt balances. CARC's collection attempts were challenged by numerous consumers upon various legal theories including the FDCPA. Finding that the CARC collectors were not officers or employees exempt under §1692a(6)(C), the panel adopted the reasoning of *Brannan* and held that the "exemption does not extend to those who are merely in a contractual relationship with the government." *Pollice*, 225 F.3d at 406. Quoting *Brannan* the court stated: "This exemption applies only to an individual government official or employee who collects debts as part of government employment responsibilities. USA Funds is a private nonprofit organization with a government contract; it is not a government agency." *Id.*

Contrary to Petitioners' assertion, the facts of *Pollice* did not involve collection

of debts for private parties. The City retained the debt-servicing rights and entered into a servicing contract with the debt collector. The same, of course, cannot be said of the L&T officer in *Heredia*.

3. *Brannan* involved a guaranteed government student loan. The private guaranty agency, USA Funds, was governed by the Higher Education Act of 20 U.S.C. §1071 et seq. After paying off the defaulted loan pursuant to its guaranty, USA Funds began collection efforts against the borrower. Eventually, the borrower sued USA Funds for violating several sections of the FDCPA. USA Funds claimed something it referred to as a "government actor" exemption and the District Court agreed. On appeal, the Ninth Circuit Court of Appeals reversed noting that where a federal statute names the parties which come within its provisions (e.g. an "officer" or "employee"), other unnamed parties are excluded. *Brannan*, 94 F.3d at 1266; citing *Foxgord v. Hischemoeller*, 820 F.2d 1030 (9th Cir. 1987). USA Funds was not a government entity, it was a private company with a "government contract."

   Like USA Funds, "special counsel" disclaimed any agency relationship with the OAG and were defined in the parties' written contracts as independent contractors. "Special counsel" are private individuals with government contracts

> who have no agency relationship with the State.

Based upon these reasons, *Heredia* cannot be viewed as analogous or apposite to the Sixth Circuit's decision.

Respondents know of no other conflicts on this issue existing in other jurisdictions. Indeed, the Sixth Circuit's decision is consistent with the reasoning of the Circuit Courts of Appeals decisions of *Pollice* and *Brannan*, and the U.S. District Court decisions of *Piper v. Portnoff Law Assocs.*, 274 F. Supp. 2d 681 (E.D. Pa. 2003); *Gradisher v. Check Enforcement Unit, Inc.*, 133 F. Supp. 2d 988 (W.D. Mich. 2001); and *Knight v. Schulman*, 102 F. Supp. 2d 867 (S.D. Ohio 1999).

II. There Is No Reason For The Court To Reconsider The Sixth Circuit's Determination That "Special Counsel's" Use Of The Ohio Attorney General ("OAG") Letterhead Stationery To Collect Consumer Debts Could Materially Mislead The Least Sophisticated Consumer In Violation Of 15 U.S.C. §1692e(9) And (14).

Petitioners' final arguments turn to the issue of whether the collection practices in this case were misleading under 15 U.S.C. §1692e. Pet. at 23-28. Petitioners urge this Court to take up the case to resolve an alleged conflict with the other Circuit Courts of Appeals over the controlling standard to

determine whether a representation or practice under the FDCPA is misleading. Should representations made in communications be measured by reference to the "least sophisticated consumer" or to the "unsophisticated consumer"? Pet. at 23-28.

Petitioners never raised this particular issue during the 2 and 1/2 year period prior to the filing of their losing request for rehearing *en banc*. Moreover, this dichotomy was not before the Sixth Circuit and was never discussed in the Sixth Circuit's ruling. Petitioners now remarkably claim that it is an important, broadly recurrent issue and that this case only "deepens the divide." Pet. at 28. It is not and it does not.

Notwithstanding Petitioners' failure to raise the issue, no meaningful conflict exists for determination. As noted in the recent case of *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98 (1st Cir. 2014):

> A majority of the circuits applies a "least sophisticated consumer" standard. See, e.g., *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 509 (6th Cir. 2007); *Terran v. Kaplan*, 109 F.3d 1428, 1431-32 (9th Cir. 1997); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir. 1996); cf. *Chiang v. Verizon New Eng. Inc.*, 595 F.3d 26, 42 (1st Cir. 2010) (referencing, though having no occasion to adopt or apply, the least sophisticated consumer standard). Labels aside, there appears to be little difference between this formulation and the "unsophisticated consumer" formulation.

> See *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 1996) ("[T]he unsophisticated consumer standard is a distinction without much of a practical difference in application."). We adopt the unsophisticated consumer formulation to avoid any appearance of wedding the standard to the "very last rung on the sophistication ladder." *Gammon v. GC Servs. Ltd. P'Ship*, 27 F.3d 1254, 1257 (7th Cir. 1994).

Pollard, 766 F.3d at 103, n.4.

Furthermore, the Sixth Circuit has consistently imposed a materiality element into its FDCPA analysis. It did so in this case even though Respondents argued that materiality should have been presumed for *per se* violations under §§1692e(9) and (14). Pet. App. at 47a; citing *Wallace v. Washington Mutual Bank, F.A.*, 683 F.3d 323, 326-27 (6th Cir. 2012). Thus, even in these circumstances, the Sixth Circuit ruled that it is not enough to establish that an offending communication is factually consistent with the specific prohibitions described under such subsections (e.g., distributing a communication that simulates an official State document; and/or using an organization name other the true name of the debt collector's business) – both of which occurred here. In order to fully prove that a representation or practice violates 15 U.S.C. §1692e, including communications at issue under subsections (9) and (14), a consumer must further demonstrate that the questioned practice or representations contained in such communications

have "the tendency to confuse the least sophisticated consumer." Id.

Moreover, over many years since the FDCPA's inception, the Sixth Circuit and many other jurisdictions clarified the meaning behind the "least sophisticated consumer" standard. The court explained that the FDCPA was designed to protect all consumers, including those who are gullible, or naïve. *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 438 (6th Cir. 2008). While consistently stating that the bar is set low, the Sixth Circuit and many others have injected qualifying factors into the analysis to eschew scenarios for "bizarre or idiosyncratic interpretations" of collection notices. *Barany-Snyder v. Weiner*, 539 F.3d 327, 333 (6th Cir. 2004). Indeed, the Sixth Circuit has further ruled that the least sophisticated consumers are presumed to have read the entirety of a collection notice with a basic level of understanding and care. *Kistner*, 518 F.3d at 438-39.

With these additional qualifications, the "least sophisticated consumer" and the "unsophisticated consumer" are largely the same person. Accordingly, the idea that a conflict exists between the two standards is without merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be DENIED.

Respectfully submitted,

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